IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO.46 OF 1997

1. Smt. Savitri Poto Gaonkar widow of)
Poto Mono Gaonkar,)
House wife (Deceased))
[Amendment Carried out as)
per order dtd. 22/8/2003 in)
MCA 432/03 in SA 46/97])

2. Master Manohar Poto Gaonkar)
aged 16 years, minor represented by)
his next friend Smt. Savitri Poto Gaonkar,)
both 1 & 2 are resident of Undorna in)
V.P. Molcornem of Quepem, Taluka)

3. Smt. Kashi Narayan Gaonkar,)
major, housewife, and her husband.)

4. Shri Narayan Babu Gaonkar,)
major, agriculturist, both 3 and 4 are)
resident of Molcopona in V.P.)
Molcornem of Quepem Taluka) ..Appellants.
(Ori. Plaintiffs.)

Versus

1. Shri Jaganath Cau Bhomkar)
(Since deceased))
[Amendment carried out as per)
court's order dated 29/10/99) in)
MCA 313/99))

)
1(A) Smt. Mirabai Jagannath Bhomkar,)
major, married, wife of the deceased)

1(B) Kum. Arati Jagannath Bhomkar,)
major, unmarried, daughter of the deceased)

1(C) Kum. Seema Jagannath Bhomkar,)
major, unmarried, daughter of the deceased)
1(D) Kum Gauri Jagannath Bhomkar,)
major, unmarried, daughter of the deceased)

1(E) Kumar Krantikumar Jagannath Bhomkar,)
major, unmarried, son of the deceased.)

All the respondents no.1(A) to 1(E) residing at)
Savordem, Taluka Sanguem – Goa.)

1(F) Shri Premanand D. Batikar,)
major, married, son-in-law of the deceased.)
1(G) Smt. Priya Premanand Batikar)
major, married, daughter of the deceased.)

Both respondents no. 1(F) and 1(G), residing)
near Figueredo Ground, Pantemol Curchorem-)
Goa.)

1(H) Shri Santosh Gawde,)
Son-in-law of the deceased.)

1 (I) Smt. Jyoti Santosh Gawde,

major, married, daughter of the deceased.)

Both respondent no.1 (H) and 1 (I), residing)
at Ponda, Keri – Goa

2. Shri Mahadeo Poto Gaonkar, aged)
65 years, resident of Undorna in Quepem)
Taluka (deceased) represented by his)
legal heirs.)

(a) Shri Poto Mahadeo Gaonkar)
son, married, and his wife.)
(b) Smt. Sundarem Poto Gaonkar,)
both r/o Undorna, Quepem Goa.)
(c) Shri Krishna Mahadeo Gaonkar,)
son, married, and his wife.)
(d) Smt. Vithem Krishna Gaonkar,)
both r/o Undorna, Quepem Goa.)
(e) Smt. Shanem Shanu Gaonkar,)
daughter, and her husband(since deceased))
[Amendment caried out as per Court's)
Order dated 29/10/1999 in MCA 510/99])

2(e)(i) Shri Srikant Shanu Gaonkar,)
major, bachlor, son of the deceased)
respondent.)

2(e)(ii) Ms. Shekuntala Shanu Gaonkar,)
major, spinster, daughter of the deceased)
respondent.)
(All residing at Soliem, Cacoda, Quepem -)

Goa.))

(f) Shri Shanu Gaonkar)
both r/o Soliem, Cancoda Quepem, Goa.)
(g) Smt. Bhaguem Yeshwant Gaonkar)
daughter, and her husband.)
(h) Shri Yeshwant Gaonkar)
(since deceased))
[Amendment carried out as per order)
dated 25/09/98 in MCA 55/98])
2(h)(i) Shri Paresh Yeshwant Gaonkar)
(Deceased)
major, son of the deceased, R/o Undorna)
Quepem, Goa)
[Amendment carried out in view of the)
order dtd17/6/05 passed in MCA 395/05])
2(h)(ii) Master Vidyanand Yeshwant)
Gaonkar, minor, 15 years old, son of)
the deceased, represented by his mother)
and natural guardian Smt. Bhaguem)
Yeshwant Gaonkar namely the)
respondent no. 2(g) R/o Undorna,)
Quepem, Goa.)
(i) Smt. Pitol Gurudas Gaonkar,)
daguther, and her husband)
(j) Shri Gurudas Gaonkar,)
both r/o Soliem Cacoda Quepem Goa.)

(k) Smt. Jayashree Prakash Borkar)
daughter, and her husband,)
(l) Shri Prakash Borkar,)

both r/o Kalay, Sanguem Goa.)

(m) Smt. Jayem Bhiku Gaonkar,)
daughter and her husband)
(n) Shri Bhiku Custa Gaonkar,)
both r/o. Wadem Sanguem Goa.)

3. Shri Bhicu Kusta Gaonkar, aged)
48 years, r/o Undorna in Quepem)
Taluka.)
4. Shri Bhavani Sazu Naik, major,)
r/o Amona in Quepem Taluka,)
(expired))
4a. Prabhakar Sazu Naik)
4b. Visranti Prabhakar Naik)
r/o Odar, in Quepem,)
4c. Shashi Babusso Naik)
4d. Mrs. Shashi Babusso Naik)
4e. Umesh Babusso Naik)
r/o. Amona, Bicholim)
)
5. Shri Hussainkhan, major (since deceased))
[Amendment carried out in view of the)
order dated 20/1/05 passed in MCA110/04)
5(i) Mrs. Aisha Bi)
wife of the deceased respondent no.5)
5(ii) Shri Aziz Khan Patan)
major, married son of the deceased)
respondent No.5 and his wife)
5(iii) Smt. Shabina Bi.)
5(iv) Shri Kadar Khan Patan)
major, bachelor son of the deceased)

respondent no.5.)
5(v) Shri Samir Khan Patan,)
major, bachelor son of the deceased)
respondent No.5)
All resident of house no.10, Dando)
Sanguem Goa.)
5(vi) Smt. Nurjahan Bi)
major, married, daughter of the)
deceased respondent no.5 and her)
huband)
5(vii) Shri Munaf Sayyed)
Both residing at House no.117,)
Varcotto, Sanguem Goa)
5(viii) Smt. Parvin Bi)
major, married, daughter of the)
deceased respondent no.5 and her)
husband.)
5(ix) Shri Ashraf)
5(x) Smt. Abida Bi)
major, married, daughter of the)
deceased respondent no.5 and her)
husband)
5(xi) Shri Munaf)
All residing at house no.10,)
Dando Sanguem Goa) Respondents.
(Ori. defendants.)

Shri V.P. Thali, with Ms. G. Pednekar, Advocates for the Appellants.

Shri S.G. Dessai, Senior Advocate with Shri Shivan Dessai, Advocate for Responents Nos. 1(A) to (I), 2(A) to 2(E)(I) and (II), 2(G), 2(I) to 2(N) and 3 and 4(b).

Mr. Aires Mesquita, Advocate for Respondents No.4 and 5 (absent)

CORAM: V.M. KANADE, J.
DATE : 5TH AUGUST, 2005

ORAL JUDGMENT:

1. The appellants are the original plaintiffs and the respondents are the original defendants. The appellants are challenging the judgment and order passed by both the lower Courts dismissing the suit of the plaintiffs on the preliminary issue by holding that the suit is not maintainable being barred by Rule (92)(3) of Order XXI of the Civil Procedure Code. The second appeal was admitted on 04/02/2000 and an ad-interim relief was granted in Civil Application No. 172 of 1997. The second appeal was admitted on the substantial questions of law formulated in para 2 of the Appeal Memo which are reproduced hereinbelow:-

> "1. Whether the property which is neither the subject matter of execution application or attachment order, nor proclamation of sale and which is factually not auctioned at all in the court auction, and which is also not referred to in minutes of auction can be included for the purpose of issuing of certificate at the time of the confirmation of sale?

2. Whether the suit is hit by Order 21 rule 92(3) of C. P. C. for setting aside the sale of a property which was never auctioned in the court auction but which was mentioned for the first time at the time of confirmation of sale?

3. Whether, the issue (Whether the defendants prove that the suit is barred by the principles of res judicata or principles anologous to res judicata or under Order XXI Rule 92 (3) of C. P. C.?) is purely question of law or mixed question of fact and law?

4. Whether the Civil Court could dispose off the suit by disposing off the issue as preliminary issue when the same pertained to the mixed question of law and facts?"

FACTS:

2. Brief facts are as under :-

3. There is a long chequered history of several litigations between the parties and since the litigations are interlinked, it would be relevant to briefly state the chronology of events in order to

properly understand the substantial questions of law which have arisen in this second appeal.

4. The first litigation started in 1972 when the respondent No.1 Jagannath Cau Bhomkar (since deceased) filed a Regular Civil Suit No. 20 of 1972 against Poto Mono Gaonkar (late husband of the appellant No.1). This suit was filed to recover the amount of Rs 3,500/- with interest which had become due and payable as a result of Hundi dated 23/06/1971. The appellants were not parties to the said suit as they are successors in interest of the said Poto Mono Gaokar. On 09/10/1975, the said Civil Suit No. 20 of 1972 was decreed and the said Poto Mono Gaonkar was directed to pay Rs 3,500/- along with interest @ 9% with costs from the date of filing of the suit till the final payment to Jagannath who was the respondent No.1 in the present appeal. On 13/01/1978, Execution Application No. 1 of 1978 was filed by respondent No.1 (Hereinafter referred to as "Jagannath") for execution of the decree passed in Regular Civil Suit No.22 of 1972. In the said application, various particulars of the amounts which were due and payable were mentioned and, further, an application for attachment of the following seven properties was filed.

> "i) "Culna" situated at Undorna, Quepem enrolled in Taluka Revenue Office under no.2.

ii) “Ponssol” situated at Undorna, Quepem enrolled in Taluka Revenue Office under no.16.
iii) Borod Somodiano ½ part - 1st adicao bearing Land Registration no. 7980.
iv) Borod Somodiano ½ part - 2nd adicao bearing Land Registration no.7981.
v) Borod Somodiano ½ part - 3rd adicao bearing Land Registration no.7982.
vi) Suktolem Poiquim alias Valisordo bearing Land Registration no. 7983 and
vii) ½ Ambeapani Poiquim bearing Land Registration no.7984.”

These properties were situated in village Malcornem. The properties at serial Nos. (vi) and (vii) were survyed under Survey Nos. 5/2, 5/3, 5/6 to 5/13, 5/16 to 5/19 and 5/23 to 5/32 of village Malcornem. The order of attachment was passed by the Court. However the properties were not identified by the Survey Numbers. It is the case of the plaintiffs that as regards the properties which were subsequently sold in the auction proceedings, the minutes of auction also did not mention the Survey Numbers and the respondents also did not disclose the Survey Numbers in the various replies which were filed by them. It is the case of the appellants/plaintiffs that in the settlement of proclamation of claim, as given by the decree holder also, only five properties are mentioned at serial Nos. B(e)(iii) to B(e)(vii). The Executing Court passed an order of attachment of the said properties

on 22/02/1978. Thereafter, the terms of settlement of proclamation of sale was filed by Jagannath on 9/10/1978. The auction was fixed on 31/03/1979. By that time, Poto Mono Gaokar had expired and the appellant No.1, who was the wife of late Poto Mono Gaokar, objected the sale on the ground that she was the moitty holder and, therefore, the properties should not be sold. Another application was filed by one Sundarem Malic, objecting the attachment of sale on the ground that she was having 1/3 rd share in the property. Both the applications were dismissed and the auction was held on 31/03/1979. In the minutes of the auction, neither the Survey Numbers nor the land registration numbers of the said properties were mentioned but only the names of the properties were mentioned. The said five properties were purchased by respondent Nos. 2 to 5. Thereafter, various applications were filed by the appellant No.1 and other persons, claiming interest in the property and, finally, on 09/04/1990, the Civil Judge, Senior Division dismissed the applications of Sundarem and two another claimants i.e. Suryaji and Shivram Malcornekar and confirmed the sale of five properties which were sold in auction.

5. The Civil Judge, Senior Division, while confirming the sale by order dated 09/04/1990 also included survey No.3/1 of village Molcornem which was the property named as “Ambeapani Ghorbhat” having Land Registration No. 16857and admeasuring about 31

Hectares. The principal controversy in the present suit is that the appellant claims that the said survey No.3/1 was neither attached nor was ever referred to in any of the proceedings. The said Survey Number was not mentioned in the minutes of the auction nor in any of the replies filed by Jagannath and others and, for the first time, the said Survey Number was incorporated by the Civil Judge, Senior Division in his Order dated 09/04/1990, confirming the auction sale. The contention of the plaintiffs is that the said property was not the subject matter of the auction proceedings at any time and, therefore, could not have been included for the first time in the order of confirmation of sale dated 09/04/1990.

6. Against the said order dated 09/04/1990, the appellants, initially, filed an appeal being Regular Civil Appeal No. 41 of 1990. However, it was dismissed by order dated 20/11/1992 and, thereafter, the appellants filed the Regular Civil Suit No. 29 of 1991. One of the reliefs claimed in the said suit was that the property bearing Survey No. 3/1 of Village Undorna in Quepem Taluka was not the subject matter of sale in execution proceedings No.1/78 in the Court of Civil Judge, Senior Division at Quepem. The defendants filed Written Statement and, inter alia, raised a preliminary objection regarding the maintainability of the suit on the ground that, firstly, it was not maintainable in view of the provisions of Rule 92(3) of Order XXI of the Civil Procedure Code and also on the ground of res

judicata. The trial court dismissed the suit on the ground that it was not maintainable as it was barred by Rule 92(3) of Order XXI of the C.P.C. Against the said order, the appellants preferred an appeal bing Regular Civil Appeal No. 41 of 1990. The District Court also dismissed the appeal on the same ground. Against the said judgment and order, the present second appeal has been filed. In the said second appeal, in Civil Application No. 172 of 1997, the learned Counsel appearing on behalf of the respondents made a statement before the Court on 24/10/1997 that the respondents shall not take possession or interfere with the property mentioned in paras 2(d), 2(e) and 2(f) of the plaint. Thereafter, an application was preferred by the respondents for vacating the said order. However, by order dated 24/12/1999, it was directed that all applications viz. Misc. Application Nos. 172/1997, 177/1999 and 178/1998 be heard alongwith the main appeal at the time of final hearing of the said appeal.

SUBMISSIONS:

7. The learned Counsel appearing on behalf of the appellants submitted that both the lower Courts had failed to consider that the property bearing Survey No. 3/1 was neither mentioned in the application for execution nor it was attached or referred to in the proclamation of sale and the said property in question was, factually, therefore never sold in auction and, therefore, the provisions of section 92(3) of Order XXI would not be applicable and, therefore, the suit filed by the appellants was maintainable. He further submitted

that the issue which was framed as a preliminary issue was a mixed question of fact and law and, as such, it was essential that the parties should have been permitted to lead evidence and, therefore, the suit would not have been dismissed solely on the basis of the said issue. He further submitted that since the preliminary issue which was framed was a mixed question of fact and law and not purely a question of law, in view of the provisions of Order XIV Rule 2, all other issues which were framed ought to have been decided alongwith the preliminary issue after an opportunity was given to both the parties to lead evidence. He submitted that the appellants had no occasion to file any objection in respect of the inclusion of Survey No.3/1 and the said Survey Number was mentioned for the first time in the order of the Executing Court dated 09/04/1990 and that it was inadvertently mentioned as one of the properties which was sold in auction when the entire documentary evidence clearly showed that, that was not the case. The learned Counsel appearing on behalf of the appellants submitted that the grievance of the appellants, as set out in the present proceedings, would have been agitated only by a separate suit and not by way of an application under Order XXI Rules 89, 90 and 91 of the C. P. C. as the said provisions would be attracted only if there was an actual auction sale or a dispute in respect of the description of he property and since there was no sale of the property at Survey No.3/1 the said provision including the bar under Rule 92 (3) of Order XXI would not be attracted in the facts of the present

case. The learned Counsel appearing on behalf of the appellants relied on number of judgments which shall be referred to hereinafter.

8. The learned Counsel appearing on behalf of the respondents vehemently opposed the submissions made by the learned Counsel appearing on behalf of the appellants. He has filed written arguments. He submitted that one of the substantial questions of law framed by this Court vide Order dated 04/02/2000 relates to the bar under Order XXI Rule 92(3) of the Civil Procedure Code and, therefore, on that ground alone, the second appeal was liable to be dismissed. It was, thereafter, submitted that against the order dated 09/04/1990, the appellants had a legal remedy of filing an appeal from order. He submitted that the appellants had filed an appeal against order and had subsequently withdrawn the same. He submitted that, therefore, the second suit which was filed by the appellants was against the provisions of Order XXI Rule 92(3) of the Civil Procedure Code and, therefore, both the lower Courts had correctly dismissed the suit of the appellants. The learned Counsel, thereafter, submitted that the sale of wrong property or a property not attached or confirmation of sale of a wrong property or the property not attached or sold or any material irregularity or fraud in publishing or conducting a sale in an execution proceedings, raises a question relating to the execution, discharge or satisfaction of decree within the meaning of section 47 of the C. P. C. He submitted that

this question was to be determined by the Executing Court and not by a separate suit in terms of the mandate of section 47 of the C. P. C. He submitted that section 47(II)(b) of the C. P. C. further lays down that all questions relating to delivery of possession of such property to such purchaser or his representative is a question relating to the execution, discharge or satisfaction of the decree within the meaning of section 47 of the C. P. C. He submitted that, therefore, the question, if any, the appellants wanted to raise, ought to have been raised in the Execution Application No. 1/1978 and not by filing a separate suit. He further submitted that the question whether the suit is barred under Order XXI Rule 92(3) of the Civil Procedure Code is a question of law and that had been answered by the trial court and the appellate court on the basis of the pleadings and documents produced by the appellants and that the preliminary issue was framed by resorting to Order XIV Rule 2 (2) of the Civil Procedure Code which empowered the trial court to frame the preliminary issue relating to the jurisdiction of the Court or bar to file the suit. He submitted that the appellants did not claim any right to lead evidence in respect of the preliminary issue and, therefore, the question of leading evidence did not arise. He, thereafter, submitted that the subject matter of the suit was the subject matter of the auction held in execution proceedings which was clear from the impugned order dated 09/04/1990. The question, therefore, of filing the second suit would not arise. The learned Counsel for the respondents, thereafter, relied

upon the judgment of the Supreme Court in the case of Govindraju Vs Mariamman reported in **2005 SC 1008** wherein the Supreme Court has laid down the limitations of the High Court in exercising its jurisdiction under section 100. He also relied upon the judgment of the Supreme Court in the case of Chunilal V. Mehta & Sons Ltd. Vs. Century Spinning and Manufacturing Company Limited reported in **AIR 1962 SC 1314** wherein the Supreme Court has laid down the test for determining the substantial question of law. He further relied upon the judgment of the Supreme Court on the same point in the case of Santosh Hazari Vs. Purushottam Tiwari reported in **2001(3) SCC 179.** He also relied upon the other judgments of the Supreme Court which laid down the limited jurisdiction of the High Court under section 100 of the Civil Procedure Code. The learned Counsel thereafter distinguished the judgments on which the reliance was placed by the learned Counsel appearing on behalf of the appellants.

FINDINGS:

9. In order to decide the substantial questions of law which are formulated by this Court when the matter was admitted, it will be relevant to consider the factual matrix of the matter. The appellant No.1, in the present case, is the wife of Poto Mono Gaonkar who was the defendant and judgment debtor in the earlier suit which was filed by respondent No.1 Jagannath in 1972. It will be relevant to consider reliefs which are claimed by the present appellants in the plaint. The appellants have claimed the following reliefs in the plaint.

"(a) That the sale of the properties in court auction dated 31-3-1979 in Execution Proceedings No.1/78 and the confirmation of sale by Order dated 9-4-1990 in Execution Proceedings No.1/78 by the Civil Judge, Senior Division, Quepem be set aside.

(b) That it be declared that the property described in para 2(f) bearing No.3/1 of Village Undorna in Quepem Taluka is not the subject matter of sale in Execution Proceedings No.1/78 in the Court of the Civil Judge, Senior Division, at Quepem.

(c) That the defendants Nos. 2 to 5 i.e. the purchasers in Execution Proceedings No.1/78 be restrained by an Order in the nature of Permanent Injunction from taking over the possession of the properties mentioned in para 2(d), 2(e) and 2(f).

(d) That the defendants be restrained by an Order and Decree in the nature of Permanent Injunction from interfering in any manner in the

properties described in para 2(d), 2(e) and 2(f) above.

(e) For the costs of the suit and any other equitable reliefs as the court deems fit and proper in the circumstances of the case."

In para 18 of the plaint, it is stated that the proper subject matter of the suit is the properties described under 2(d), 2(e) and 2(f). It would be, therefore, necessary to consider what are the properties which are mentioned under 2(d), 2(e) and 2(f).

"2(d) The property "SUCTOLEM POIQUIM alias VALISOROD", registered under No.7983, situated at Undorna of Molcornem of Quepem Taluka and bounded by East: by the property Peddeamola of Comunidade; to the West: by rivulet and aforamento Gogeamollo of Suble Porob; to the North: by the property Ambeapani Poiquim of Saguna Poto Gaonkar and others and to the South: by the property Talliband of Saguna Poto Gaonkar and others.

2(e) The property "AMBEAPANI POIQUIM", paddy filed, situated at Undorna of Molcornem of Quepem Taluka, registered under No.7984 and

bounded as follows: East: by paddy field Ambeapani of Pundalica Borkar and others; to the West: by rivulet i.e. Permanent water stream; to the North: by the property Naralam of Tencho & others and to the South: by rocky land by name Outembiasoddo.

2(f) The property known as "AMBEAPANI GORHAT" or "GORBHAT", situated at Undorna in Quepem Taluka, described in the Land Registration Office under No.16857 and surveyed under No.3/1 and bounded;

On the East: Aguas vertentes extenting upto the village boundary of Shelpem village.

On the West: Property Suktolem Poiquim alias Valsisorod bearing Survey No.6/1 and paddy field having survey Nos. 5/14, 5/23, 5/32 and 5/31.

On the North: by hillock and paddy field bearing survey Nos. 5/20, 5/21 and 5/22 and
On the South: by hillock."

The suit was filed, inter alia, on the ground that since only a sum of Rs 1019.20 with interest remained to be recovered, it was not

necessary to auction all the properties. Secondly, that 1/3 rd share of the judgment debtor and his wife should not have been attached and sold unless and until the share of the wife was separated by judicial separation and that the execution proceedings were not filed against the plaintiffs. Thirdly, that the area and boundaries of the properties and their proper value was not given and, therefore, there was no compliance with the requirements of Order XXI Rule 66(2) of the Civil Procedure Code. That the major part of the property consisted of tenanted fields and, therefore, it could not have been attached and sold in execution of the decree of Civil Court as per section 16 of the Goa Daman and Diu Agricultural Tenancy Act, 1964. Lastly, in para 28 of the plaint it was alleged that the land under Survey No.3/1 which was the property described in para 2(f) was not the subject matter of attachment and sale and the said property was never sold in auction. It was alleged that the Civil Judge, Senior Division, had wrongly included Survey No.3/1 in the property sold in his order dated 09/04/1990 while confirming the sale, without hearing the plaintiffs.

10. In the Written Statement, it was primarily alleged that all the issues and facts which were raised in the said suit had been agitated by the plaintiffs in the execution proceedings No.1/1978 and both, the plaintiff Savitri and her husband had filed several applications, challenging the auction sale which had taken place on

31/03/1979. It was further alleged that the suit was barred in view of the specific provisions under Order XXI Rule 92(3). The original defendant No.5 in para 7 of his Written Statement has, in fact, stated that the wrong inclusion of the property Survey No.3/1 in the final order of confirmation of sale was curable under section 152 of the Civil Procedure Code on the ground of clerical or arithmatical mistake in the judgment and, therefore, it could not be a subject matter of a separate suit. The defendants 1, 2 and 3 raised more or less the similar objections in their Written Statements in respect of the property described in 2(f). The defendant No.2 in his Written Statement has stated that the said property was purchased in court auction by defendant No.3. In the written statement filed defendant No.2, with reference to para 28 of the plaint, the following averments have been made.

> "28. With reference to para 28, the contents of its are denied. It is submitted that Survey No.3/1 is not matter of attachment and Court auction as alleged."

11. On these pleadings, the following issue was framed as a preliminary issue by the trial court:-

> "1. Whether the defendants prove that the suit is barred by the principles of res judicata or

> principles analogous to res judicata or under Order XXI Rule 92(3) of C. P. C.?"

12. Both the Courts below have held that the suit was not maintainable since it was barred by the provisions of rule 92(3) of Order XXI of the C. P. C.

13. It would be relevant to reproduce the substantial questions of law which have been formulated by this Court and which are found in para 2 of the Appeal Memo which read as under:-

> "1. Whether the property which is neither the subject matter of execution application or attachment order, nor proclamation of sale and which is factually not auctioned at all in the court auction, and which is also not referred to in minutes of auction can be included for the purpose of issuing of certificate at the time of the confirmation of sale?
>
> 2. Whether the suit is hit by Order 21 rule 92(3) of C. P. C. for setting aside the sale of a property which was never auctioned in the

court auction but which was mentioned for the first time at the time of confirmation of sale.

3. Whether, the issue (Whether the defendants prove that the suit is barred by the principles of res judicata or principles anologous to res judicata or under Order XXI Rule 92 (3) of C. P. C.?) is purely question of law or mixed question of fact and law?

4. Whether the Civil Court could dispose off the suit by disposing off the issue as preliminary issue when the same pertained to the mixed question of law and facts?"

14. The short question, therefore, which falls for consideration before this Court is : whether both the courts below were justified in dismissing the suit on the preliminary issue which was framed without deciding the other issues which had been framed by the court and, secondly, where the property which is not sold in auction and is wrongly included in the final order of confirmation of sale, whether such an order can be challenged by filing a separate suit or even such a suit would be barred by the mandate provided under Order XXI Rule

92(3) of the Civil Procedure Code?

15. The main issue which arises in the facts and circumstances of this case is : whether the present suit is not maintainable in view of the bar under Order XXI Rule 92(3) of the Civil Procedure Code. The gist of the case of the plaintiffs is that the property described in para 2(f) i.e. Survey No.3/1 was never sold in auction and, as such, there was no question of including this Survey Number in the confirmation of sale and, secondly, so far as properties described in schedule 2(d) and 2(e) are concerned, the other objections regarding the procedure which is followed in execution proceedings have been raised. In the first instance, I shall consider, whether the suit is maintainable in respect of the objections which are raised with regard to the properties described in 2(d) and 2(e) and, thereafter, I shall consider whether the objections in respect of the property described in 2(f) can be considered in the second suit. Before discussing the factual aspects of the case, it would be relevant to consider the scheme of the Code.

<u>The scheme under Civil Procedure Code pertaining to auction of the property:-</u>

Rules 88, 89, 90 and 91 of Order XXI of C. P. C. lay down the complete procedure which is required to be followed in respect of the objections to the sale, which are enumerated in the aforesaid

rules. Rule 89 permits an application to be made by any person claiming interest in the property to set aside the sale on depositing the decretal amount. Various conditions have been laid down in the said rule. Rule 90 permits an application to be made to set aside the sale on the ground of irregularity or fraud by any person interested or having share in the property. Sub-rules (2) and (3) of Rule 90 prescribes when such an application can be made. Rule 91 permits the application to be made by the purchaser of the property for setting aside the sale on the ground that the judgment debtor has no salable interest in the property to be sold in auction and rule 92 lays down when the sale becomes final and absolute. Sub-rule (3) of Rule 92 further lays down that where any order is passed under this rule, no suit can be filed by a person against whom such an order is made.

16. The learned Counsel appearing on behalf of the appellants has strenuously urged that so far as the property described in para 2 (f) i.e. Survey No. 3/1 of Village Undorna Taluka Quepem is concerned, it was not sold in auction and, as such, there was no question of confirmation of the sale of the said property. He has strenuously urged that since the property was not sold in auction, the application of provisions of rules 89, 90, 91 or 92 would not arise and, consequently, the bar prescribed under sub-clause (3) of Rule 92 of Order XXI would not be attracted. On the other hand, the learned

Counsel appearing on behalf of the respondents has strenuously urged that the appellants/plaintiffs were aware of the proceedings since 1984 and had filed several applications and had admitted that the property bearing Survey No.3/1 had been sold by relying on the reply filed by the plaintiffs in one of the applications and, therefore, it was urged that from the facts which are pleaded in the plaint and documents on which the reliance was place by the plaintiffs, it was clear that the plaintiffs were barred from challenging the sale of the said property which was finally confirmed by the impugned order challenged in the suit.

17. In the present case, the trial court as well as the first appellate court have proceeded on the footing that once the order is passed confirming the sale under sub-clause (3) of Rule 92 of Order XXI, it cannot be gone into in the second suit which is filed by the person who has interest in the property.

18. In my view, in order to decide whether bar under sub-rule (3) of Rule 92 of Order XXI operates in the facts and circumstances in a given case, the trial court will have to first ascertain whether the property which is a subject matter of the suit was, in fact, sold in auction to satisfy the debt or liability of the decree holder. Only after ascertaining the fact that the property which is in dispute in the second suit is, in fact, sold in auction and no application is made

under rule 89, 90, 91 of Order XXI or such an application having been made is rejected by the Executing Court and the sale is thereafter confirmed under Rule 92, the Court can proceed to decide the question of maintainability of the suit. If from the proceedings of the parties and the documentary evidence which is produced by the plaintiffs and defendants it can be decided that the property in question was sold in auction then the Court can proceed to decide the said suit on the preliminary issue itself. If on the other hand, the plaintiffs are in a position to establish from the pleadings and the various documents in respect of the execution proceedings that the property in question was never the subject matter of the sale and that both the parties to the execution proceedings and the earlier suit were aware of this fact then merely because the property has been mentioned in the final order of confirmation then, in that case, the trial court would not be entitled to decide the preliminary issue alone and that the said question would not be merely a question of law but a mixed question of fact and law and in such a case all the issues will have to be decided together.

19. In the backdrop of this legal position, the facts of the particular case will have to be examined. So far as the properties which are described in para 2(d) and 2(e) is concerned, it is an admitted position that in the application for execution of a decree filed by respondent No.1, seven properties have been mentioned and the properties at 2(d) and 2(e) are mentioned at serial Nos. 6 and 7 of the

said application. The Land Registration Number of the property at serial No.7 mentioned in the application is stated as No.7984. However, the property mentioned in 2(f) of the plaint does not figure in this list since the Registration Number of property at 2(f) is No.16857, whereas the one in 2(e) is stated as Registration No.7984. Then, in the terms of settlement of proclamation of sale, the properties at 2(d) and 2(e) in the plaint are mentioned at II and III of the terms of settlement of proclamation of sale. Here also, the property in 2(f) is not mentioned. Similarly, in the public notice which was issued in the news-paper also, there is a reference to the property mentioned in 2(d) and 2(e) of the plaint at serial Nos. 4 and 5 whereas there is no reference in respect of the property mentioned in 2(f) of the plaint. Thereafter, perusal of the minutes of the auction sale which was held in the court premises on 31/03/1979 reveals that the properties mentioned in paras 2(d) and 2(e) are referred in para (d) and the property in respect of 2(e) is referred in para (e) of the minutes of the auction sale. However, there is no reference to the property described in para 2(f) of the plaint. In the applications filed by the plaintiffs also, there is no reference to property mentioned in 2(f) and there is a specific reference to the properties mentioned in 2(d) and 2(e).

20. Thus, in respect of the applications which were filed for setting aside the sale on one ground or the other by the appellants, there is a specific reference to the property described in 2(d) and 2(e)

of the plaint and all these applications have been rejected by the Executing Court and even appeals which were filed against the said order have been rejected. In the face of this overwhelming record which has been produced by the parties, in my view, the bar regarding the maintainability of the second suit under Order XXI Rule 92(3) will squarely operate so far as the properties which are described in 2(d) and 2(e) are concerned and in respect of these two properties, both the lower courts were fully justified in recording their finding that the present suit which was filed by the appellants/original plaintiffs challenging the confirmation of sale by order dated 9/4/1990 is not maintainable. The concurrent findings recorded by the trial court and the lower appellate court in respect of these properties are, therefore, confirmed and the second appeal, is dismissed in respect of the properties which are described in 2(d) and 2(e) of the plaint.

21. However, in respect of the property which is described in 2 (f) is concerned, in my view, from the available documentary evidence on record, it does appear, prima facie, that it has not been established that this property was, in fact, auctioned in the auction sale which was held on 31/3/1979. The learned Counsel appearing on behalf of the respondents has vehemently urged that plaintiff – Savitri admitted in her application which was filed under Order XXI Rule 90 of the Civil Procedure Code that the property Survey No.3/1 along with other properties were surveyed and sold in auction and, therefore, it was not

open for her to now contend that the said property was not included in the auction. A perusal of the said application dated 4/4/1988 which is at Exhibit-65 reveals that in para 5 of the said application what is stated by the plaintiff – Savitri is that the plaintiff was the owner of Survey No.3/1, 5/2, 5/3, 5/6 to 5/13, 5/16 to 5/19, 5/23 to 5/32 and that the area of the said property admeasures lakhs of square metres with plantation and paddy land therein and, therefore, the court ought to have stopped the sale suo moto. In my view, it may not be possible to come to the conclusion on the basis of this averment that the said Survey No. 3/1 was admitted to be sold in auction. From the record, it can be seen that the third party Sunderem Malic and one Suryaji Molcornekar and Shivram Molcornekar had filed applications under Order XXI Rule 90. While deciding these applications, the property Survey No.3/1 has been mentioned for the first time by the Civil Judge, Senior Division in the order dated 09/04/1990. There is, therefore, some substance in the submissions made by the learned counsel appearing on behalf of the appellants that the property described in para 2(f) was never the subject matter of sale and the auction which took place on 31/3/1979. In the face of this record, it was the duty of the trial court to have decided the issue in respect of the property described in para 2(f) alongwith other issues, after permitting the parties to lead evidence. Both the lower courts, not having followed the said procedure, in my view, have committed a grave error in deciding the

suit pertaining to the property described in 2(f) on the preliminary issue by holding that it is not maintainable in view of the bar under rule 92(3) of Order XXI of the Civil Procedure Code. While deciding the issue regarding the maintainability of the suit, the trial court ought to have first considered whether the provisions of Order XXI Rule 92 sub-clause (3) were applicable to the property in question. If there is prima facie evidence to indicate that the said property was not the subject matter of the auction which was held, in that case, the provisions of order XXI Rule 89, 90, 91 and 92 would not apply at all and the Executing Court, therefore, would not be justified in including the property which is not auctioned or sold in auction and include such property in its order of confirmation of sale. In my view, therefore, if the sale itself had not taken place in respect of a particular property, the confirmation of the sale of such property need not arise. Such an order could be challenged in the second suit on the ground that it is non est. All these questions, therefore, ought to have been decided by the trial court alongwith other issues which were raised by the parties in respect of the property described in 2(f). The submission of the learned Counsel appearing on behalf of the respondents that the issue whether the suit is barred under the provisions of Order XXI Rule 92(3) is a pure question of law and, therefore, it would be decided by the trial court as a preliminary issue cannot be accepted. In a given case, if the plaintiffs are in a position to show that the property which is not sold in auction is referred in

the final confirmation of sale under Order XXI Rule 92(1) then the said issue would become a mixed question of fact and law and the Court would be required to decide the issue after considering the factual aspect of the case and the oral and documentary evidence which is brought on record and, thereafter, decide whether the bar under the aforesaid section should be made applicable or not. If such a question which is a mixed question of fact and law is to be decided by the trial court then, in my view, it would be appropriate to decide all other issues which have been raised and framed by the trial court. For the aforesaid reasons, in my view, both the lower Courts have committed an error in not deciding the preliminary issue in respect of the property described in para 2(f) alongwith other issues and, on that ground also, the finding of both the courts below that the suit is not maintainable in respect of the property described in 2(f) is clearly illegal and the said finding will have to be set aside and the matter will have to be remanded back to the trial court for deciding the maintainability of the suit vis-a-vis the property described in 2(f) alongwith other issues which have arisen in the matter.

22. It is no doubt true that the Supreme Court has, in catena of judgments, laid down the guidelines for determining the scope and jurisdiction of the High Court in deciding second appeals and the Supreme Court has also considered what would be a substantial question of law. Both the Counsel appearing on behalf of the

appellants and the respondents have referred to number of judgments. There cannot be any dispute regarding the ratio laid down in the said judgments. In the present case, however, considering the legal and factual position and for the reasons stated hereinabove, this second appeal is partly allowed in respect of the property described in para 2(f) of the plaint and the matter is remanded to that extent with the direction to the trial court to decide the same as expeditiously as possible and, in any case, within a period of six months. Part of the decree passed by the trial court in respect of the property described in para 2(d) and 2(e) and which is confirmed by the first appellate court, is confirmed.

23. Since the matter is remanded back to the trial court, all submissions which are made by the learned Counsel appearing on behalf of the appellants and by the respondents on the factual and legal aspects are kept open and, therefore, I do not propose to discuss and decide whether the judgments on which the reliance is placed by the learned Counsel appearing on behalf of the appellants and the respondents are applicable to the facts of the present case and both the parties are at liberty to canvass these questions and make their legal submissions and the trial court shall decide the same on merits and in accordance with law.

24. In the result, appeal is partly allowed in the above terms.

(V.M. KANADE, J.)